

**United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL**

Advice Memorandum

DATE: October 3, 1997

TO : Robert H. Miller, Regional Director
Region 20

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: The Hillsdale Group
Case 20-CA-27832 530-4825-6700
530-4850-6700
The Hillsdale Group d/b/a Peninsula
Plaza Health Center
Case 20-CA-27820

These cases were submitted for advice as to whether an Employer is a Burns successor where it purchases the assets and assumes operations of a facility and then informs the employees that they are being offered temporary employment for a period of only thirty days, and at the end of such period terminates such employment to embark on a 4 to 4.5 month long hiatus; and whether the employees are temporary employees, or did the Employer label them as such in order to evade its successor bargaining obligation under Burns?

FACTS

The Employer is a limited partnership licensed to operate two types of health care institutions in California, convalescent homes and retirement centers. The facility involved in the instant dispute is the convalescent home Peninsula Plaza Health Care Center, located in Menlo Park, California. Quality Long Term Care of Nevada, Inc. was the preceding employer of Peninsula Plaza. The Union has represented a unit of Certified Nursing Assistants, Licensed Vocational Nurses, Nursing Assistants, dietary, housekeeping, and maintenance workers employed by Quality at Peninsula Plaza for several years, and the current collective-bargaining agreement has effective dates of November 1, 1996 through October 31, 1997.

On January 28, 1997,¹ Quality's president, Steve Pavlow, told Union representative Arnold Sails that he was looking for a buyer for the facility.

Sometime between January and mid-March 1997, Sails presented Pavlow with the Union's demand to bargain over vacation pay and other benefits owed to the employees by Quality, and over the effects of Quality's decision to cease operations. Pavlow responded that Quality was in bankruptcy, and therefore Sails did not pursue this demand any further. The Union has not to date filed an 8(a)(5) failure to bargain charge against Quality concerning the effects of the sale to Hillsdale.

On March 17, Pavlow told Sails that The Hillsdale Group might be purchasing the facility. Sails informed Pavlow that if the sale were to become official, the Union should be notified; Sails stated that the facility would remain union. Also on March 17, all employees of Quality were given a memo from Laurie Pepper, Vice President of Healthcare Operations of The Hillsdale Group, informing them that the Hillsdale Group had begun operations of Peninsula Plaza effective immediately. She further stated, "as the new operator of Peninsula Plaza, The Hillsdale Group is offering you **temporary employment** for a period of thirty (30) days from today while we assess the operational and staffing needs of the facility. Depending on those needs, you may be considered for employment beyond this thirty day period." The memo also stated that the current employee salary and wage rates would remain in effect, but that Hillsdale was still investigating the issue of benefits and would inform employees at a future date as to whether they would retain the same benefit structure which Quality had offered.

On March 18, Sails received a letter from Louis Swart, the Chief Operating Officer for Hillsdale; Swart informed the Union that Hillsdale had begun management and operations of the facility effective March 17. Swart further stated that Hillsdale had made an asset purchase of the facility from Quality, and therefore it would not assume the collective-bargaining agreement in effect between Quality and the Union. Swart stated that Hillsdale

¹ Unless otherwise indicated, all dates refer to dates in 1997.

was offering the employees of the facility temporary employment only, for a period of 30 days from March 18, and that upon the expiration of the 30 days, their employment would end unless they had been selected for regular employment. The letter further stated that during its first 30 days of operation, Hillsdale would interview applicants for regular employment and the employees were free to apply. However, Hillsdale would be selecting its workforce from the most qualified applicants to be employed under Hillsdale's terms and conditions of employment.

On March 27, Sails wrote to Swart and demanded that Hillsdale commence bargaining for a new contract with the Union. On or around the same date, Sails learned from employees that Hillsdale planned to close the facility, and therefore on March 28, Sails again wrote to Swart and demanded that Hillsdale immediately meet to bargain with the Union over the impact and effects of the closure. On approximately April 4, Sails received a response from Swart reiterating that he was only offering temporary employment for 30 days to the employees formerly employed by Quality. He also stated that Hillsdale had not yet determined the type and scope of services to be provided at the facility, or when the facility would be reopened. Swart also stated that although Hillsdale had initially hoped to begin selecting its workforce during the 30 day period of temporary employment, Swart had ultimately realized that Hillsdale could not begin such procedures until the company had determined the nature and scope of its future operations. Swart also indicated that Hillsdale did not believe it had an obligation to bargain with the Union at that time given the temporary status of the employees. During the 30-day period of employment, no employees were interviewed for regular positions.

By April 7, all of the employees at the facility had been terminated by Hillsdale. On April 8, Sails wrote to Swart and informed him that Hillsdale had hired and retained all of the unit employees upon commencing operations of the facility on March 17. Sails renewed his demand to bargain and stated that upon commencing operations. Hillsdale had automatically recognized the Union, and thus it had an obligation to bargain toward a contract which would cover these employees. Shortly after April 16, Sails received Swart's written response, in which

Swart referred Sails to his earlier letters for Hillsdale's position on any obligation to bargain with the Union.

After renovations, the facility reopened as a convalescent center on August 18 under the name of Menlo Park Place. It is unclear how many of the predecessor's employees were hired.²

ACTION

We conclude that Complaint should issue, absent settlement, alleging that the Employer is a "perfectly clear" successor under Burns since the Employer planned to retain all of the employees in the unit. Thus, the Employer violated Section 8(a)(5) when it refused to recognize and bargain with the Union and unilaterally changed terms and conditions of employment.

1. Employees Hired as Probationary, Not Temporary Employees.

The issue of whether an employer can hire a predecessor's employees as "temporary" employees and escape successorship obligations has not been specifically addressed by the Board. Thus, in Houston Building Service, Inc.,³ the Board found that the employees of the predecessor were hired as permanent employees of the successor. The Board rejected the employer's contention that the predecessor's employees were hired as temporary, since there was no evidence that the employees were told they were being hired as temporary. Accordingly, the Board did not address the issue of whether an employer can hire a majority of a predecessor's employees only for a temporary, transitional period, and therefore be relieved of successorship obligations even if all other successorship factors are present.⁴

² The Union has to date not filed a charge concerning the reopening.

³ 296 NLRB 808, n.2 (1989), enfd. 936 F.2d 178 (5th Cir. 1991), cert. denied 112 S.Ct. 1159.

⁴ In enforcing the Board's decision, the Court of Appeals opined that the employer "likely could have avoided this

While the Board has not addressed the impact of hiring employees on a temporary basis on an employer's successorship obligation, the Board has defined who is a temporary employee in deciding unit placement and eligibility to vote issues. Thus,

the test for determining the eligibility of individuals designated as temporary employees is whether they have an uncertain tenure. Thus, if the tenure of the disputed individuals is indefinite and they are otherwise eligible, they are permitted to vote. [Citations omitted]. On the other hand, where employees are employed for one job only, or for a set duration, or have no substantial expectancy of continued employment and are notified of this fact, and there have been no recalls, such employees are excluded as temporaries.⁵

The above cases and principles of law, however, do not have any direct applicability in the instant matter because they concern an individual's community of interest and placement in an otherwise appropriate unit. Thus, the Board has not applied these community of interest principles to decide whether a entire unit of short term employees is an appropriate unit.

More relevant cases involve situations where the Board dismissed representation petitions on non-effectuation grounds in circumstances where the petitioned-for employees would be permanently laid off in the near future. In Fraser-Brace Engineering Co.,⁶ for example, the Board dismissed a representation petition without prejudice where construction work on the project was nearing completion and

situation [successorship] by simply telling the holdovers that they were only temporary." 137 LRRM 2983, 2985.

⁵ An Outline of Law and Procedure in Representation Cases, Office of the General Counsel, September 1995, Section 20-200, p. 317. See e.g. St. Thomas-St. John Cable TV, 309 NLRB 712, 713 (1992).

⁶ 38 NLRB 1263, 1264 (1942).

all or most of the employees in the unit sought were to be laid off within the next one or two months. In Hughes Aircraft Co.,⁷ the Board dismissed a petition to represent a unit of guards where the company was ceasing guard operations and subcontracting those operations to two security agencies. Similarly, in Lawson Plywood,⁸ the Board dismissed a petition where "the imminent closure of the plant herein is sufficiently certain that it would not effectuate the policies of the Act to conduct an election at this time." Id. at 1161. The Board noted, however, that should the employer's stockholders rescind their resolution to liquidate, or should the employer not proceed under plans to liquidate, the petition would be reinstated upon a proper showing of those changed circumstances. Id. at 1161, n.2.

Applying the above case law to the instant case, it is clear that under Board representation law, had a petition been timely filed prior to the temporary hiatus, the Board would not have automatically dismissed the petition based upon the "imminent ceasing of operations" cases described above. Here, the Employer never contemplated a permanent shutdown. Rather, the Employer shut down for only 4 months for renovations and reopened the facility on August 8. Thus, since the employees herein constitute an otherwise appropriate unit, and the Employer had hired a majority of employees at the time the Union demanded recognition and bargaining, the Employer is a Burns successor.

The Employer contends that is not a successor because it has not hired a complement of employees, much less a representative complement. The Employer asserts that it hired the predecessor employees for only 30 days and these employees had no reasonable expectation that their employment would continue when the facility reopened. In sum, the Employer argues the time to determine successorship is when the facility reopened in August not in March when the Employer acquired the facility with the purpose of operating it for only 30 days. The gravamen of the Employer's argument and its relationship to the above

⁷ 308 NLRB 82 (1992).

⁸ 223 NLRB 1161 (1976).

cases is that the predecessor's employees had no expectation of recall in August and therefore the composition of the unit in August would not include these employees. Accordingly, no representative petition would have been processed in these circumstances and therefore there should be no bargaining obligation.

We conclude, however, that the evidence establishes that the employees were not hired to be discharged after 30 days, but were hired and given reasonable expectation of continued employment beyond the 30 days term. In this regard, although employees were told they would be hired as "temporary," they were also led to believe that this "temporary" status was akin to a probationary period to allow the Employer to evaluate the employees. Thus, by letter dated March 17, the Employer told all employees that during their employment over the next 30 days, the Employer would be assessing the "operational and staffing needs of the facility," and "[d]epending on those needs, you may be considered for employment beyond this thirty day period." Further, in its March 18 letter to the Union, the Employer stated that it would interview applicants during this initial 30 days and current employees were free to apply. However, there is no evidence that the Employer sought outside applications and the Employer admits that it never interviewed either the current employees or applicants during this 30 day period. In these circumstances, although being told they were "temporary," the employees were in fact probationary employee and could have reasonably expected to continue employment with the Employer.

Further, although the Employer originally asserted that he had hoped to shut down operations immediately after acquiring the assets, but that the state of California would not permit him to do so because of patient concerns, the Employer has failed to present any evidence to this effect, despite being asked, and it appears that the Employer could have bought the facility in a shut down mode had it so desired. In this regard, the Employer was able to shut down the facility in three weeks. There is no showing that the predecessor was unable to do the same and sell the facility in a shut down mode.

2. The Employer is a "Perfectly Clear" Burns Successor.

A successor employer normally has the freedom to set initial terms and conditions of employment for its newly-hired work force. However, the Supreme Court in NLRB v. Burns Security Services,⁹ enunciated an exception to this rule, involving "instances in which it is perfectly clear that the new employer plans to retain all of the employees in the unit and in which it will be appropriate to have him initially consult with the employees' bargaining representative before he fixes terms." In Canteen Company,¹⁰ the Board applied this "perfectly clear" exception to hold that

when the Respondent expressed to the Union its desire to have the predecessor employees serve a probationary period, the Respondent had effectively and clearly communicated to the Union its plan to retain the predecessor employees. [Footnote omitted]. Therefore, as it was "perfectly clear" on [that date] that the Respondent planned to retain the predecessor employees, the Respondent was not entitled to unilaterally implement new wage rates thereafter.

The Board relied on the fact that at the time the employer contacted both the union to say that it wanted employees to serve a probationary period, and the employees to say that it wanted them to apply for employment, it "did not mention in these discussions the possibility of any other changes in its initial terms and conditions of employment."¹¹ The Board stated that under previous case law interpreting the "perfectly clear" exception, including Spruce Up Corp.,¹² Roman Catholic Diocese of Brooklyn,¹³ and Fremont Ford,¹⁴

⁹ 406 U.S. 272, 294-95 (1972).

¹⁰ 317 NLRB 1052, 1053 (1995).

¹¹ Id. at 1052.

¹² 209 NLRB 194 (1974), enf'd 529 F.2d 516 (4th Cir. 1975).

¹³ 222 NLRB 1052 (1976), enf. denied in relevant part sub. nom. Nazareth Regional High School v. NLRB, 549 F.2d 873 (2d Cir. 1977) (Board imposed an obligation to bargain

"an employer who was silent about its intent with regard to the existing terms and conditions of employment would be found to be a 'perfectly clear' successor if it stated or clearly indicated it would be hiring the predecessor's employees."¹⁵ Thus, in order for a successor employer lawfully to set unilaterally terms and conditions of employment, it must "clearly announce its intent to establish a new set of conditions prior to inviting former employees to accept employment."¹⁶

about initial terms of employment prior to the new employer's extension of formal offers of employment to the predecessor's employees, in circumstances where the employer made an unequivocal statement to the union of an intent to hire all of the predecessor's lay teachers, but did not mention any changes in terms and conditions of employment. Later, it submitted an employment contract with unilaterally changed terms and conditions of employment).

¹⁴ 289 NLRB 1290, 1296-1297 (1988) (Board imposed initial bargaining obligation under the "perfectly clear" exception on an employer which manifested the intent to retain the predecessor's employees prior to the beginning of the hiring process, in circumstances where the employer informed the union that it would retain a majority of the predecessor's employees, but did not announce significant changes in initial terms and conditions of employment until it conducted hiring interviews).

¹⁵ Canteen, 317 NLRB at 1053. The Board distinguished its earlier dismissal of a complaint in Spruce Up by noting that in that case the employer was not a "perfectly clear" successor because representatives explicitly stated in its initial meeting with the union that initial pay rates would be different from those of the predecessor. Spruce Up, 209 NLRB at 195.

¹⁶ Canteen, 317 NLRB at 1054, quoting Fremont Ford, 289 NLRB at 1297.

In East Belden Corporation,¹⁷ the Board adopted an ALJD which held that the employer was a perfectly clear successor where it retained the entire previous bargaining unit, but had "indicated to the employees that at some time in the future, after escrow, certain unspecified changes in their terms and conditions of employment would be instituted." The judge concluded that the employer was not free to set employees' initial terms and conditions of employment where the employees were not "clearly informed of the nature of the changes which Respondent intended to institute in the future, rather Respondent's announcement was couched in generalized and speculative terms."¹⁸ Thus, under East Belden an employer which promises to hire a predecessor's employees, but announces vague, undefined changes in their employment terms starting on some future date has an obligation to negotiate such changes with the statutory bargaining representative.

We conclude that the instant matter falls within the Burns "perfectly clear" exception. In this regard, we note that contemporaneously with signing the assets purchase agreement on March 17, the Employer hired all the predecessor's work force without any interruptions of operations. The Employer was under no obligation to do so. Further, these employees were working for the Employer under preexisting terms and conditions of employment at least part of the day prior to being notified there was a new employer. Finally, by letter dated March 17, the Employer notified the employees that: they were hired for 30 days and would be considered for employment beyond the 30 day period; and that the Employer intended to "keep in place, for all employees, the salary and wage rates that were in effect immediately before we took over," and would let the employees know about benefits as soon it had more information. Thus, since the Employer failed to announce new terms and conditions of employment prior to becoming the Employer of the predecessor's employees, and, as in East Belden, supra, only alluded to a possible change in benefits sometime in the future, we conclude that under

¹⁷ 239 NLRB 776, 793 (1978), enf'd 634 F.2d 635 (9th Cir. 1980).

¹⁸ Ibid.

Canteen, Fremont Ford, and East Belden, the Employer, as a "perfectly clear" Burns successor, was not free to set unilaterally terms and conditions of employment and was obligated to bargain with the Union over changes to employees' contractual working conditions. The Employer's failure to do so constituted a violation of Section 8(a)(5).¹⁹

B.J.K.

¹⁹ The fact that the Employer was an assets purchaser from a bankrupt employer does not relieve it of its successorship obligations. The Board finds successorship despite foreclosures and bankruptcy actions if the ensuing entity substantially continues the predecessor's operations. See e.g. Fall River Dyeing and Finishing Corp., 482 U.S. 27, 43 (1987).